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INSURANCE DEPARTMENT
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ADMIN HEARINGS OFFICE

BEFORE THE INSURANCE COMMISSIONER
OF THE
COMMONWEALTH OF PENNSYLVANIA

IN RE: : ALLEGED VIOLATIONS:
: :
Vincent Anthony Pacella : 40 P.S. 310.11 (6), (7), (9), (17) and
3580 Middleboro Road : (20).
Pittsburgh, PA 15234 :
: Respondent :
: :
COMMONWEALTH OF :
PENNSYLVANIA INSURANCE :
DEPARTMENT : Docket No. **SC19-11-017**

ADJUDICATION AND ORDER

AND NOW, this 6th day of March, 2020, Jessica K. Altman, Insurance Commissioner of the Commonwealth of Pennsylvania (“Commissioner”), makes the following Adjudication and Order.

HISTORY

This case began when the Pennsylvania Insurance Department (“Department”) filed an Order to Show Cause (“OTSC”) on November 26, 2019 directed to Vincent Anthony Pacella (“the respondent” or “Pacella”). The OTSC alleged that Pacella violated the Insurance Department Act.¹ Specifically, the OTSC alleged that Pacella, a licensed insurance agent, incorrectly completed an application for a life insurance policy without his customer’s knowledge, submitting it with funding by electronic fund transfers which

¹ Act of May 17, 1921, P.L. 789, No 285 *as amended through* the Act of June 25, 1997, P.L. 349, No. 40, *repealed and partially reenacted by* the Act of December 3, 2002, P.L. 1183, No. 147. (40 P.S. §§ 310.1 *et. seq.*).

DATE MAILED: March 6, 2020

caused an overdraft of the customer's bank account.

The OTSC advised Pacella to file an answer in accordance with applicable regulations (1 Pa. Code § 35.37), and further advised him that the answer must specifically admit or deny each of the factual allegations made in the OTSC. The respondent was advised to set forth the facts and state concisely the matters of law upon which he relies. He further was advised of the consequences of failing to answer the OTSC. Following the filing of the OTSC, a presiding officer was appointed and the Administrative Hearings Office served the appointment order on Pacella by certified mail with return receipt and by first class mail. The certified mail was returned to the Administrative Hearings Office as "unclaimed" and "unable to forward." The first class mailing has not been returned as undeliverable.

Pacella failed to answer the Department's OTSC or otherwise respond to the Administrative Hearings Office. On January 8, 2020 the Department filed a motion for default judgment and served Pacella in accordance with 1 Pa. Code Chapter 33.² The motion declared that the Department served the OTSC by both certified and first class mail to the respondent to his last known home address as kept on file in the Department and that the document was not returned to the Department as undeliverable. The certified mail return receipt has not been returned to the Department. Notice of the OTSC was also published in the Pennsylvania Bulletin on Saturday, December 14, 2019. The respondent has not filed a response to the OTSC or motion for default judgment, nor made any other filing in this matter.

This adjudication and order addresses the motion for default judgment and the order to show cause. Factual findings and some legal conclusions are contained within

² On January 13, 2020 the Department filed an amended motion for default judgment to correct a minor typographical error which has no bearing on this adjudication.

the body of this adjudication.

DISCUSSION

This adjudication is issued without scheduling an evidentiary hearing, since Pacella failed to answer the OTSC or motion for default judgment. The OTSC and motion advised as to the consequences of the failure to respond.³ However, because of the language in the penalty provisions of applicable statutes, this adjudication includes an analysis of an agency's authority for imposing penalties without an evidentiary hearing.

There are no factual disputes in the present matter. All factual averments in the OTSC are deemed to be admitted under 1 Pa. Code § 35.37.

Under general rules of administrative procedure, a final order may be entered without hearing for an insufficient answer to the OTSC unless otherwise provided by statute. *See* 1 Pa. Code § 35.37 (“Mere general denials . . . will not be considered as complying with this section and may be deemed a basis for entry of a final order without hearing, unless otherwise required by statute, on the ground that the response has raised no issues requiring a hearing or further proceedings.”). A respondent failing to file an answer within the time allowed shall be deemed in default. *Id.* Department regulations do not limit the Commissioner's ability to order a default judgment without a hearing, so any limitation must come, if at all, from a statute.

In order for an adjudication by a Commonwealth agency to be valid, a party must have a “reasonable notice of a hearing and an opportunity to be heard.” 2 Pa.C.S. § 504 (Administrative Agency Law). Similarly, the statute specifically applicable to the present

³ The OTSC warned the respondent that failure to answer in writing would result in the factual allegations being deemed admitted and that the Commissioner could enter an order imposing penalties.

case⁴ provides for a hearing procedure prior to certain penalties being imposed by the Commissioner. *See* 40 P.S. § 310.91.⁵ However, given that the respondent has not answered the OTSC and given current caselaw, these hearing procedures are inapplicable.

While no court has directly addressed the power of a Commissioner to enter a default judgment without hearing in a case under the Insurance Department Act, the caselaw supports such power. For example, in *United Healthcare Benefits Trust v. Insurance Commissioner*, 620 A.2d 81 (Pa. Cmwlth. 1993), the Court affirmed the Commissioner's grant of summary judgment for civil penalties despite the language contained in the applicable statutes which seemed to require a hearing.

In a case involving another agency, the Commonwealth Court upheld summary judgment imposing discipline issued by a commission despite the fact that the respondent had requested a hearing. *Kinniry v. Professional Standards and Practices Commission*, 678 A.2d 1230 (Pa. Cmwlth. 1996). In *Kinniry*, the applicable statute (24 P.S. §§ 2070.5(11), 2070.13) provided for a hearing procedure before discipline was imposed. However, the respondent's attorney merely requested a hearing without answering the specific factual averments in the charges against the respondent (which charges were treated as an order to show cause). The Court upheld the summary judgment since deemed admission of the factual averments presented no factual issues to be resolved at hearing.

⁴ Insurance Department Act, Act of May 17, 1921, P.L. 789, No. 285 *as amended* by the Act of December 3, 2002, Act. No. 147 (40 P.S. §§ 310.1 *et seq.*).

⁵ The Insurance Department Act section mandates written notice of the nature of the alleged violations and requires that a hearing be fixed at least ten (10) days thereafter, and further provides that:

After the hearing or failure of the person to appear at the hearing, if a violation of this act is found, the commissioner may, in addition to any penalty which may be imposed by a court, impose any combination of the following deemed appropriate: . . .

40 P.S. § 310.91. This Section then lists available penalties.

The Commissioner consistently has applied the reasoning of *United Healthcare* and similar cases when the respondent does not answer the order to show cause and a motion for default judgment. See *In re Czmus*, SC09-05-009 (2009); *In re Kroope*, SC09-12-005 (2010); *In re Chappel*, SC14-10-024 (2015); *In re Ott*, SC15-11-002 (2016). The Commissioner adopts this reasoning in the present case: the important aspects of 2 Pa.C.S. § 504 are notice and the *opportunity* to be heard. Default judgment is appropriate, despite language in applicable statutes which seems to require a hearing, when a respondent fails to take advantage of his opportunity to be heard. When a respondent in an enforcement action is served with an order to show cause detailing the nature of the charges against him as well as the consequences of failing to respond, yet fails to answer the allegations or to answer a subsequent motion for default judgment, the Commissioner adopts the Commonwealth Court's reasoning that the respondent had an opportunity to be heard but has rejected the opportunity.

Additionally, there are no factual matters to address at a hearing. Since the factual allegations of the OTSC are deemed admitted, the determination by the Commissioner is a legal rather than a factual one. A hearing is not necessary for this type of determination. See *Mellinger v. Department of Community Affairs*, 533 A.2d 1119 (Pa. Cmwlth. 1987); *United Healthcare, supra*. The Commissioner adjudicates the present case based upon the undisputed, admitted facts as alleged in the OTSC.

The facts include that Pacella was a licensed insurance agent who maintained a record of his address with the Department as 3580 Middleboro Road, Pittsburgh, PA 15234. At all relevant times, Pacella was a licensed resident insurance producer. However, that license was ordered temporarily suspended on October 15, 2018 by a judge in the Court of Common Pleas of Allegheny County, Pennsylvania. Pacella's license expired on February 28, 2019.

In 2016, while employed by the New York Life Insurance Company (“Insurer”), Pacella transcribed information from Ms. B. Marsh’s (“insured’s”) first life insurance policy to complete an application for a second life insurance policy without her knowledge or consent. On that application, Pacella listed his own telephone number, forged the insured’s signature and submitted the application to the Insurer without the insured’s authorization. This second insurance policy was funded through electronic fund transfers which caused an overdraft of the insured’s bank account. When the insured filed a complaint, the Insurer refunded the insured. The Insurer then terminated Pacella’s appointment.

As an additional consequence of this action, the respondent was arrested in Allegheny County, Pennsylvania and charged with a felony count of forgery. He was also charged with misdemeanor offenses of theft by deception, insurance fraud and identity theft.

As a result of his actions the Department has charged Pacella with five violations of the Insurance Department Act: 1) committing an unfair insurance practice or fraud in violation of 40 P.S. § 310.11(6); 2) committing fraudulent, coercive or dishonest practices in violation of 40 P.S. § 310.11(7); 3) forging another person’s name in violation of 40 P.S. § 310.11(9); 4) committing fraud, forgery or dishonest acts in violation of 40 P.S. § 310.11(17); and 5) demonstrating a lack of general fitness, competence or reliability sufficient to satisfy the Department that the licensee is worthy of licensure in violation of 40 P.S. § 310.11(20).

For each of these five charges, the Commissioner has authority to impose remedial action against the respondent, including suspension or revocation of his certificate of qualification or license as well as imposing a penalty of up to \$5,000.00 per violation. 40

P.S. § 310.91. Prohibited acts are listed in 40 P.S. §§ 310.11. In the present case, the admitted facts support sanctions for each of the charges against Pacella.

In one instance Pacella transcribed a client's information from one life insurance policy to an application for a second policy without the insured's knowledge. He then submitted that application to the Insurer with false information. These actions constituted fraud in violation of both 40 P.S. § 310.11(6) and 40 P.S. & 310.11(7). On that same application, Pacella also forged the insured's name without her knowledge and submitted the application in violation of both 40 P.S. § 310.11(9) and 40 P.S. § 310.11 (17).

Finally, Pacella violated 40 P.S. § 310.11(20) as contained in Count V, which requires general fitness, competence and reliability demonstrating worthiness of licensure. The respondent's fraudulent actions in the process of submitting a false application for life insurance demonstrated a lack of fitness to be licensed as a professional insurance producer.

The elements of all these charges are established by the admitted facts. With the respondent liable for remedial action under each of these charges, the appropriate remedial action must be established for each one.

PENALTIES

The Commissioner may suspend or revoke a license for conduct violating certain provisions of the Insurance Department Act, including those provisions violated by the respondent's conduct. 40 P.S. § 310.91. Each action violating a provision specified in section 310.11 subjects the actor to a maximum five thousand dollar civil penalty. 40 P.S. § 310.91(d)(2).

A Commissioner is given broad discretion in imposing penalties. *Termini v. Department of Insurance*, 612 A.2d 1094 (Pa. Cmwlth. 1992); *Judson v. Insurance Department*, 665 A.2d at 523, 528 (Pa. Cmwlth. 1995). Each of the underlying actions in the present case directly are connected to the respondent's duties as an insurance agent. Pacella caused harm to one of his clients by appropriating her personal information so that he could submit a life insurance policy application without her knowledge or consent. He caused additional harm by forging her signature and setting up the new policy to be funded by electronic fund transfers, triggering an overdraft of her bank account.

The underlying conduct in the present case is of the most serious nature, and directly connected to Pacella's duties as an insurance agent. This seriousness is reflected in the penalties imposed. Pacella's infliction of financial harm on another evidences a moral turpitude which is antithetical to the trustworthiness required in the profession. By definition, agents and brokers have extensive personal contact with applicants and insureds. The applicants and insureds entrust financial and personal matters to the agent, and rely upon the agent's integrity. An agent who has recently inflicted financial harm upon another is incapable of the trust necessary in the profession. Simply put, Pacella at this time cannot be trusted with the pocketbooks, bank accounts and personal information of his customers. The harm inflicted by Pacella involves more than the loss of premium payments. By submitting a fraudulent life insurance policy application and using personal banking information which caused an overdraft, Pacella deprived at least one policyholder of the security and peace of mind which insurance provides. The respondent took far more than money.

No evidence exists to mitigate the seriousness of the violations. Pacella did not offer mitigating evidence or arguments. An aggravating factor in this case, beyond the fraud perpetrated by the respondent in his role as an insurance producer, is his failure to

acknowledge or to participate in these proceedings.

The Department in its OTSC requested that the Commissioner revoke the respondent's insurance producer's license(s), bar the respondent from future licensure as an insurance producer, bar the respondent from applying to renew any license previously held by him, impose a \$5,000.00 civil penalty per violation, and impose other appropriate conditions including restitution and supervision should the respondent ever become relicensed. In its motion for default judgment, the Department also requested that the respondent be ordered to cease and desist from violating insurance laws.

Considering the facts in this matter, the applicable law, the seriousness of the conduct and all aggravating and mitigating circumstances, penalties are imposed as set forth in the accompanying order.

CONCLUSIONS OF LAW

1. The Commissioner has jurisdiction over the parties and subject matter of these proceedings.
2. The Department may revoke or suspend a certificate or license upon finding that an agent or a broker has engaged in conduct which would disqualify him from initial issuance of a certificate or a license.
3. Unworthiness to hold a license may be established by a producer's failure to comply with the law which prohibits unfair insurance practices, fraud or dishonesty.
4. Unworthiness to hold a license may be established when a producer forges a client's signature on an insurance policy application.
5. If unworthiness is established, the Commissioner may exercise discretion to impose remedial action in light of the producer's conduct as well as mitigating and aggravating factors.
6. Producers are held to a high degree of professionalism and must exercise good judgment.
7. Producers on the front line dealing with the insurance-buying public must avoid conduct demonstrating a disregard for regulations which protect those consumers.
8. Vincent Anthony Pacella by his conduct demonstrates current unworthiness to hold an insurance license.

9. If any of the foregoing Conclusions of Law should be held to constitute Findings of Fact, the ones so found are incorporated therein by reference.

BEFORE THE INSURANCE COMMISSIONER
OF THE
COMMONWEALTH OF PENNSYLVANIA

IN RE:	:	ALLEGED VIOLATIONS:
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Vincent Anthony Pacella	:	40 P.S. 310.11 (6), (7), (9), (17)
3580 Middleboro Road	:	and (20).
Pittsburgh, PA 15234	:	
	:	
Respondent	:	
	:	
COMMONWEALTH OF	:	
PENNSYLVANIA INSURANCE	:	
DEPARTMENT	:	Docket No. SC19-11-017

ORDER

AND NOW, based upon the foregoing findings of fact, discussion and conclusions of law, it is **ORDERED** as follows:

1. Vincent Anthony Pacella shall **CEASE AND DESIST** from the prohibited conduct described in the adjudication.

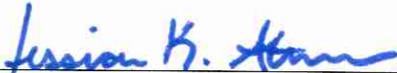
2. All of the insurance licenses or certificates of qualification of Vincent Anthony Pacella, if any still remain in effect, **ARE REVOKED** for a minimum of five (5) years pursuant to 40 P.S. 310.91 for each of Counts I through V with these revocations to run concurrently with each other for a total minimum period of five (5) years. Additionally, Vincent Anthony Pacella is prohibited from applying for a certificate of qualification to act as a producer in this Commonwealth for a minimum of five (5) years. Vincent Anthony Pacella is also prohibited from applying to renew any certificate of qualification previously held by him in this Commonwealth for a minimum of five (5) years.

3. Vincent Anthony Pacella shall pay a civil penalty to the Commonwealth of Pennsylvania within thirty (30) days of this order as follows:

- a. Counts I and II: \$5,000.00
- b. Counts III and IV: \$5,000.00
- c. Count V: \$1,000.00

for a total of eleven thousand (\$11,000.00) dollars. Payment shall be made by certified check or money order, payable to the Commonwealth of Pennsylvania, directed to: Administrative Assistant, Bureau of Licensing and Enforcement, 1227 Strawberry Square, Harrisburg, Pennsylvania 17120. In addition to the above restrictions, no certificate of qualification or other insurance license may be issued or renewed until the said civil penalty is paid in full.

4. This order is effective immediately.



JESSICA K. ALTMAN
Insurance Commissioner